Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

A-ONE MEDICAL SERVICES, INC.; ALTERNATIVE REHABILITATION HOME HEALTHCARE, INC.; LORRAINE BLACK and HANAHN KORMAN,
Petitioners,

v.

ELAINE L. CHAO, Secretary of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

ELIZABETH ZINK PEARSON
Counsel of Record
LUCIAN BERNARD
PEARSON & BERNARD P.S.C.
1224 HIGHWAY AVENUE
COVINGTON, KY 41011
(859) 655-3700

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1) Whether an employer commits a willful violation of the Fair Labor Standards Act by disregarding the very possibility that it was violating the Act?

2) Whether separately owned but commonly managed employers who allow employees the opportunity for extra work with either entity are joint employers pursuant to the Fair Labor Standards Act interpretive bulletin rule on joint employment, 29 C.F.R. §791.2?

STATEMENT PURSUANT TO RULE 29.6

Petitioner A One Medical Services, Inc. is a Washington corporation wholly owned by Petitioner Lorraine Black, a resident of the State of Washington.

Petitioner Alternative Rehabilitation Home Health, Inc. is a Washington corporation wholly owned by Petitioner Hanahn Korman.

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PETITIONER FOR WRIT OF CERTIORARI

Petitioners respectfully petition this court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals was filed on October 6, 2003 and is reported at 346 F.3d 908 (9th Cir 2003). The memorandum opinion of the District Court for the Western District of Washington was not published but is reprinted in the Appendix herein.

JURISDICTION

The Department of Labor, by and through its Secretary, Elaine Chao, brought suit against the Petitioners in the United States District Court for the Western District of Washington for alleged violations of the Fair Labor Standards Act by failing to pay overtime to employees who worked for both corporate petitioners, A-One Medical Services Inc and Alternative Rehabilitation HomeHealthcare, Inc. The Department of Labor alleged that the failure to pay overtime as required by the Act was willful allowing extension of the backwage liability to a third year.

The District Court granted summary judgment to the Department of Labor ruling that the Petitioners were joint employers of the eight (8) employees who were offered work and chose to work for both companies, and found that the failure to pay overtime was willful based on statements of the interested employees and in part due to past conciliation agreements between the Petitioner, A-One Medical Services, and the Department of Labor. On appeal to the Ninth Circuit, the court affirmed the decision as to liability for overtime pay

and the willful nature of the violation, but found the claim of one (1) employee barred by res judicata. Jurisdiction to hear this case is invoked under 28 U.S.C. §1254(1).

STATEMENT OF STATUTES AND REGULATIONS AT ISSUE

29 U.S.C. §203(d)

Section 203 defines the concepts applicable to the Fair Labor Standards Act and subsection (d) defines an employer as any person acting directly or indirectly in the interest of an employer in relation to an employee.

29 U.S.C. §203(g)

Section 203 defines to "employ" as "to suffer or permit work."

29 U.S.C. §207(a)(1)

Section 207(a) provides the basic duty to pay overtime wages, stating except as otherwise provided in this section, no employer shall employ any of his employees which in any workweek is engaged in commerce...or is employed in an enterprise engaged in commerce...for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §255(a)

Section 255 provides the applicable statute of limitations and therein the recovery period requiring that the action be commenced within two (2) years after the cause of action accrued...., except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

STATEMENT OF THE CASE

Following a lengthy period of investigation by the U.S. Department of Labor, Wage and Hour Division, lasting over a year and one half, the Petitioners were notified of an alleged violation of the overtime pay requirements in July 2000. During the course of the investigation, the DOL provided the Petitioners with no information as to the nature of a possible or alleged overtime violation, but simply requested information on employees working for both companies. Instead, the investigators arrived at A-One Medical's office and notified Lorraine Black, the owner of A-One Medical and clinical manager of Alternative Rehabilitation, of an overtime pay assessment and civil monetary fine. Only then did they advise her that she and the company she managed, and hoped to purchase, were joint employers of any employee who worked for both companies and therein had to calculate all hours worked for both companies for overtime pay purposes.

Lorraine Black, the principal of A-One Medical Services, Inc. assumed clinical management of Alternative Rehabilitation Home Health, Inc. as part of the ongoing sale agreement and due to ongoing financial and tax liability problems of the owner, Hanahn Korman. Alternative was a fledgling company that was specially licensed to provide Medicare and Medicaid home health services in several specific counties in Washington. A-One Medical Services,

Inc. is a non-Medicare/Medicaid company which provides private nursing services to residents in other Washington counties. The scope of the services of the two (2) companies are markedly different due to the differences in the types of patients served. Both companies, however, did employ highly skilled nurses to provide services to patients - Medicare patients for Alternative and private individuals, most notably medically fragile children for A-One Medical.

In order to maintain the operations of Alternative during the pendency of the sale, Alternative and A-One employees were offered the opportunity to work for one or the other company. Neither company guaranteed full-time work because the need for their services ebbed and flowed and the government payer sources provided very small operating margins. Therein, employees were offered assignments and always had the right to accept or reject the work. The employees signed applications and separate employment documents for each company and received separate checks for services rendered at distinct rates of pay ranging from fifteen to twenty dollars an hour. The company operations remained separate with no agreement to share employees between them.

The Department of Labor initiated its investigation the Fall of 1998 and then almost two years later delivered their determinations of the overtime pay violations. Neither Petitioner had information or instruction that, despite the need to maintain the separate companies during resolution of the tax problems for the pending sale, they would be viewed as jointly employing all staff who worked for one or both companies. It was not until earlier in 2000, that the first indication occurred when several employees who terminated from the companies claimed a right to overtime pay based on the hours worked for both companies in a small claims court action. In defense, A-One successfully argued to the Court that the companies were separate and distinct and no overtime

pay was due. Shortly after entry of judgment in favor of A-One, the DOL made its assessment.

In their conciliation process, the DOL demanded a settlement for the total amount of backwages and demanded over $5,000 in civil monetary payments. The DOL asserted the violation was willful due to prior findings of liability on failure to pay overtime which were uncontested and settled. These prior conciliations did not occur on the joint employment rule and applied only to A-One Medical. In fact, the companies maintained their separateness of the employment relationships with their staff in part to avoid overtime pay violations with the advice of counsel who worked with them on the corporate stock sale.

The Petitioners refused to conciliate or settle the alleged violation directly with the DOL. The Department of Labor then filed a complaint for violation of the Act in the U.S. District Court for the Western District of Washington. The parties filed cross motions for summary judgment including the defense that the claim for overtime was barred by res judicata due to the small claims action filed by the employees. The District Court awarded summary judgment to the government, finding that the two (2) entities were joint employers due to the relatedness of the companies operations, common business purposes of the entities, and the common management of the companies by Lorraine Black, the owner of A-One Medical. In addition, the Court ruled that the violations were willful based on statements made by employees involved in the litigation which implied that the separateness of the companies was a sham to avoid the duty to pay overtime and the fact that Ms. Black acknowledged that she could not afford to pay overtime. The Court also rejected the defense of res judicata.

The Petitioners appealed to the Ninth Circuit Court of Appeals which affirmed the lower court decision on the substantive liability as joint employers and on the finding of

willful violations of the Act. The Ninth Circuit however did rule that for one of the employees at issue res judicata barred her claim. The Court relied on its existing precedent on joint employment to affirm the finding of liability and the willful nature of the violation adding that the repeat offender status warranted the willful violation.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Petitioners here plead for the Writ or Certiorari on both the issues of joint employment and the standard used for the willful violation finding. Petitioners submit that the Courts and the Department of Labor have applied the interpretive joint employment rule expansively using an ambiguous and overbroad standard which severely restricts the employers ability to understand their duty to pay overtime wages, their ability to hire highly qualified workers for fear of overtime pay liability, and those workers right to choose to work for additional employers. In addition, the Ninth Circuit has adopted a lesser, negligence based standard for the willful violation which is contrary to this Court's and other Circuits' standard and creates a "repeat offender" status not otherwise in accord with the law.

ISSUE 1:

1. The Decision Below On The Willful Violation Creates a Negligence Standard That Is In Conflict With This Court's *Richland Shoe* Test and Rulings From Other Circuits.

This Court last addressed the willful standard for violations of the Fair Labor standards Act in McLaughlin v. Richmond Shoe Co, 486 U.S. 128 (1988), in which it was

ruled that a willful violation requires evidence that the employer "knew or showed reckless disregard" as to whether its conduct violated the Act. This standard was established based on both the language of the Act and on the common understanding that a willful act must involve more than mere negligence. Instead, this Court correctly held that willfulness necessarily denotes an intentional, voluntary or deliberate act. Richmond Shoe at 133. In that case, this Court specifically rejected the Secretary of Labor's argument which imposed an implicit duty to consult legal counsel or take further steps to more or less gain legal assurance of compliance with the overtime duties under the Act. Thus, the standard enunciated by this Court requires more than an unreasonable or incorrect belief by the employer of compliance with the Act. Rather, there must be some affirmative circumstances to evidence some deliberate conduct or intention pertaining to the duty to pay overtime or to otherwise not comply with the Act. Id at 135 n.13.

The Ninth Circuit has expanded this standard to circumstances in which "an employer was or should have been cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions, or where the employer disregarded the very possibility that it was violating the statute." Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir 2003); See also, Marshall v. Union Pacific Motor Freight Co., 650 F.2d 1085 (9th Cir 1981). A mere disregard for a possible violation of the duty to pay overtime, without more, cannot rise to the level of a reckless disregard or a willful violation under this Court's standard. Instead, this Court's reckless disregard standard implies a rejection of a known or perceived duty, "a level of knowledge of and refusal to comply with the FLSA." Baystate Alternative Staffing, Inc. v. Herman, 168 F.3d 668 (1st Cir. 1998); Reich v. Waldbaum, Inc., 52 F.3d 35 (2d Cir 1995). See, Martin v. Deiriggi, 985 F.2d 129 (4th Cir 1992).

Contrary to this Court's Richmond Shoe reckless disregard standard, and in conflict with other circuits, the Ninth Circuit rule imposes an absolute affirmative duty on employers to "inquire further" into the legality of their conduct. SEIU, Local 102 v. Co. of San Diego, 60 F.3d 1346 (9th Cir 1995)(No willful violation where employer relied on substantial legal authority when it decided not to compensate for standing time);Alvarez, supra (Disregarding the very possibility of a violation); Contra, Reich v. Dept of CONS & Nat'l Resources, 28 F.3d 1076 (11th Cir 1994)(Employer's duty to inquire further is negligence); Elwell v. University Hospital Home Care, 276 F.3d 832 (6th Cir 2002); Walton v. United Consumers Club, Inc., 786 F.2d 310 (7th Cir 1986); Reich v. Gateway Press, Inc., 13 F.3d 685 (3d Cir 1994). It is the clear rule in Richmond Shoe and in rulings from the Third, Fourth, Sixth, Seventh, and Eleventh Circuits that mere negligence is insufficient to support a finding of a willful violation of the FLSA.

The Ninth Circuit's ruling, though, effectuates its own negligence standard. The failure to "inquire further" about the requirements of the FLSA, without more deliberate conduct, cannot rise above pure negligence. See, *Prosser and Keeton on Torts*, §30, Fifth Edition (Elements of negligence include a duty or obligation recognized by law and a breach of that duty). This ruling is even more significant in the context of this case and others in which the duty to pay overtime wages hinges on a relatively obscure or non-promulgated rule under the FLSA such as the joint employment rule. Without information or education on the joint employment liability, the Petitioners here individually complied with the Act's requirements. Overtime accrued only as a result of the joint employment determination causing a collapse of all hours worked for the two employers. As argued below, the joint employment rule usurps normal business practices in which employees are paid by individual employers who have

individual tax identification numbers, rates of pay, application procedures, clientele, type of range of services or products, and are distinct corporate entities. As noted by the Seventh Circuit, "willfulness denotes a range of culpability from gross negligence to actual knowledge plus malice depending on the context." Walton, supra at 308. Here, as in other cases, there is an ignorance based on common business practices and common sense, which could not even raise "the very possibility of a violation of the Act" in the minds of the employers, nor evidence the necessary culpability for a willful finding. Alvarez, supra.

Petitioners submit that the Ninth Circuit's "disregard for the very possibility" rule as applied imposes a negligence standard for willful findings which conflicts with other Circuits and this Court's decisions. Accordingly, review is warranted to resolve the conflict, to restate the correct "reckless disregard"standard and as a result reverse the decision below on the willful violation.

2. The Decision Below Creates A Repeat Offender "Strict" Liability For Finding Willful Violations Of The FLSA Contrary To The Reckless Disregard Standard.

The Court below placed specific reliance on past violations by Petitioner A-One Medical Services, Inc. and its owner, Lorraine Black, as support for the finding that the violations here were willful. In so doing, the Court again looked at its "disregard for the very possibility of a violation" ruling implying that past violations impose a superior duty on an employer or establish some base of knowledge of possible future violations. A-One Medical, Slip op at 14821-22, (Reproduced in Appendix at "App. P. 18a). The FLSA imposes a generic duty to pay overtime to employees who work in excess of forty hours in any one workweek. 29

U.S.C. §207(a) However, the statute also provides a litany of exemptions and exceptions, standards for salary payment and fee payment necessary for exemptions, provisions for compensatory time in lieu of overtime pay for public employees, as well as numerous interpretive bulletins such as the joint employment rule. The failure to fully comply with any of these acknowledged "outdated" and "unclear" rules can create a default duty to pay overtime. *ESA News Release*, "U.S. Department of Labor Proposal Will Secure Overtime for 1.3 Million More Low-Wage Workers." 3/27/2003; "Statement of Labor Secretary Chao on Victory for Effort to Guarantee Overtime Pay for Low-Wage Workers" 7/10/2003. Therefore, an employer could repeatedly violate the Act by a failure to comply with one or many of the multitudes of rules, regardless of their underlying intent.

Clearly, the basis of a prior violation and any promise of future compliance could weigh on a willful finding if that prior violation was specifically repeated. A repeat of the same mistake on compensatory time, use of an exemption, or docking of salaried employees wages clearly would be in reckless disregard and therein a willful violation of the Act. But, the mere repeated failure to pay overtime, such as applied here, without regard to the cause of that failure or the substantive violation that occurred, cannot establish a reckless disregard for the Act.

Instead, such a blanket repeat offender status subverts the reckless disregard standard established by this Court and places employers at risk of penalties for willful violations of the Act based on different, and perhaps unknown and unclear substantive rules. See, e.g., Reich v. Newspapers of New England, Inc., 44 F.3d 1060 (1st Cir 1995). A decision on a willful violation has been determined to be a mixed question of law and fact, with one Court ruling that the factual issues predominate. Pabst v. Oklahoma Gas, 228 F.3d 1128 (10th Cir 2000). In contrast, willful liability based on prior

violations of the Act, as used here, implies an absolute knowledge of all the Act's requirements and as such imposes a strict "willful" liability without reference to underlying facts that may or may not support a reckless disregard of the many requirements of the Act. Use of repeat offenses as a basis for finding a willful violation imposes an extraordinary burden on employers with strict liability consequences contrary to this Court's standard. Therefore, summary reversal of the decision below is warranted due to the Court's imposition of an inappropriate "repeat offender" standard.

ISSUE 2:

1. **The Decision Below Imposes Joint Employment Liability For All Employers Who Commonly Employ A Worker Which Is Overbroad And Ambiguous.**

On October 6, 2003, the Ninth Circuit issued its decision which affirmed the District Court's ruling on summary judgment that, for the purpose of liability for overtime pay, Petitioners here were joint employers for all employees that chose to work for one or the other company. As a result, these two distinct employers were required to aggregate all hours worked by commonly employed employees to determine if any employee was entitled to overtime pay. Petitioners now submit to this Honorable Court that the Ninth Circuit opinion should be reviewed because it blindly applied the interpretive joint employment rule to the Petitioners without regard to the lack of economic benefit exchanged between the two (2) employers and the employees' lack of a common economic dependence on both corporate entities. As such, the ruling establishes an overbroad and ambiguous standard for businesses who cannot provide full-time work and therein allow employees to work elsewhere.

The Department of Labor's joint employment interpretive bulletin states in relevant part:

> "(a) ...If the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employers, all the work for all the joint employers during the workweek is considered as one employment for the purposes of the Act...
>
> > (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. " 29 C.F.R. §791.2(b)(3).

The legal application of the interpretive joint employment rule is an issue of first impression with this Court. The rule was promulgated in 1958 in the form of an interpretive bulletin, not otherwise subject to requirements for notice and comment. 29 C.F.R. §791.2. As part of an interpretive bulletin, the joint employment rule is a statement of general policy without the force of law, although such policies are given some weight by Courts. Skidmore v. Swift Co, 323 U.S. 134 (1944). The rule acknowledges that individuals should be free to enter into employment relationships with multiple employers. Yet, it also requires that those common employers must be "entirely independent of each other and completely disassociated." 29 C.F.R. §791.2(a). The Secretary has failed to provide any explanation or example of joint employment relationships or those that would be construed as completely disassociated. As such, the literal

rule imposes on employers a blanket duty to pay overtime to employees who may choose on their own to work with an affiliated business which is overbroad and prejudices independent employers' business interests and operations.

Petitioners were found to be joint employers for all employees who chose to accept extra work with the companies solely based on the association of Lorraine Black with Alternative Rehabilitation Home HealthCare. Although her role ultimately included overall management of the company pursuant to a provision in the sale contract, she obtained none of the profits from Alternative's services. As simply the manager of the company, her employment relationship with Alternative's staff the two distinct businesses for one common business purpose. Her sole benefit was a prospect of ownership of Alternative which in the end failed to occur. Nevertheless, the Department of Labor and the courts below found that Ms. Black's contracted management of Alternative was sufficient to deem her and A-One, not completely disassociated, and therein joint employers. As a result, all hours the common employees chose to work was aggregated for single workweeks and over $8,000 in overtime pay accrued. A-One Medical Services, Inc., et al, at 14819, App. P. 15a.

The FLSA itself does not mandate joint employment liability nor address liability which extends to circumstance in which an employee voluntarily chooses to work for another employer. Employers have an affirmative duty to comply with the FLSA overtime requirements. 29 U.S.C. §207(a)(2)(C). Yet the statute and accompanying regulations have been acknowledged to be unclear to both employers and employees. *Statement of Secretary Chao 9/10/03, Dept of Labor News Release;* See, *GOP Senator Criticizes Bush OT Proposal,* The New York Times, 1/20/04. Here and in other cases, the Department of Labor and Courts have blindly

applied the "not completely disassociated" non-regulatory standard without regard to the totality of the "employer/employee" relationships and the underlying intent of the FLSA. The completely disassociated test as applied here is overbroad as it imposes overtime pay liability on legitimate business arrangements and independent contractor relationships where there is only the barest association or a simple potential of a common business purpose. See, Western Illinois Home Health Care v. Herman, 150 F.3d 659 (7th Cir 1998); Patel v. Wargo, 803 F.2d 632 (11th Cir. 1986).

The notion of joint employment rule is based in part on this Court's decision in Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed 1772 (1947). In Rutherford, the Court was asked to evaluate the employer status of a meat packing company who contracted out a portion of their slaughterhouse operation to individual "independent contractor" boners. The Court evaluated the broad definition of an employer under the Fair Labor Standards Act and referenced the legislative intent of the Act to lessen "subnormal labor conditions" including "low wages and long hours" to benefit "the health and well-being of workers." Rutherford at 727. The Court acknowledged the broad definition of "employ" intended to reach many "working relationships." Id at 729. Yet, it acknowledged that there could be independent contractors involved in a business who "would alone be responsible for wages and hours of their own employees," but not where the work is "part of an integrated unit of production" such as the boners role in the slaughterhouse operations. Id

It is rational and proper in light of the broad intent of the FLSA to impute overtime pay liability to a company who receives the benefit, the product, of an integrated "unit of production." Rutherford, supra. It is that company who converts the employees' labors into profit, either indirectly or directly. As an "economic reality," the producer or employer

at the top of the chain in the aggregate "production unit" suffered or permitted the work. 29 U.S.C. §203(g). Yet, a simple association between companies in management for whom employees independently choose to work do not in all cases have the same integration where the fruits of the employees labor benefit all entities in the chain. Rutherford, supra. Thus, the "not completely disassociated" test is ambiguous and overbroad in its application here and other cases where the sole tie between the entities is contracted management.

Over time the joint employment rule became confused and intertwined in migrant and farm worker cases in which courts collapsed the FLSA interpretive rule with a specific "joint employment" promulgated regulation under the Agricultural and Migrant Workers Protection Act. 29 U.S.C. §1802; 29 C.F.R. §500.20(h)(5), See, Real v. Driscoll Strawberry Assoc., 603 F.2d 748 (9th Cir 1979); Antenor v. D& S Farms, 88 F.3d 925 (11th Cir 1996). As in Rutherford, the farm worker cases involve an integrated production unit with low wage workers performing an essential function in the integrated farm product production. The standard in the farm cases adopts the Rutherford "economic realities" of the employer/employee relationship based on the totality of the circumstances, but fails to distinguish the essential integration of the workers in the production unit. Rutherford, supra at 728, 730; See e.g., Torres-Lopez v. May, 111 F.3d 633 (9th Cir 1997).

Moreover, in the evolution of the AWPA joint employment rule, courts have also failed to acknowledge the independence of an employee to refuse work, as an essential factor as was intended by Congress when the law was enacted. Comments to the AWPA rule note the Congressional intent for a broad joint employer liability under that Act was to adopt the standard set by the 5th Circuit in Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235 (5th Cir

1973), cert denied, 414 U.S. 819 (1973). 29 C.F.R. §500.20(h)(5)(ii). The Griffin& Brand court analyzed a farm production company's status as an"employer" of the employees of contracted crew leaders as a question of fact. In Griffin & Brand, the 5th Circuit outlined a five factor "economic reality" test to determine if the company was a joint employer of the farm hands based on the totality of the circumstances including analysis of the workers integration in production and a final factor of whether "the employee (could) refuse to work for the company or work for others?" Id

Over time, though, the recognition of an employee's right to choose to work as part of the economic realities test has not been adopted by courts in review of FLSA joint employment, nor by the Department itself in its enforcement position. See, Driscoll Strawberry Assoc, supra; Antenor, supra; Baystate Alternative Staffing v. Herman, 163 F.3d 668 (1st Cir 1998). Instead, courts have looked to the broad statements in the interpretive rule without regard to the ultimate economic reality of who actually suffered or permitted the work and whether that labor was performed of the independent choice of the laborer. In addition, Courts have failed to acknowledge the underlying intent of the FLSA to protect low wage workers in these circumstances. In this case, the employees were highly paid professionals who were afforded the right to refuse to work. Here, then as in other cases, the Department of Labor has applied the joint employment rule to effectively impose overtime pay duties to any common employers without regard to the economic realities of who benefits from the production of the employee and the employees' independent right to choose to work. See, Western Illinois Home Health, supra; Bonnette v. Ca. Health & Welfare Agency, 704 F.2d 1465 (9th Cir 1983); Karr v. Strong Detective Agency, Inc., 787 F.2d 1205 (7th Cir 1986).

One Circuit Court has noted, in reviewing FLSA liability, that "it should not lightly be inferred that Congress intended to disregard...the shield from personal liability which is one of the major purposes of doing business in the corporate form." Patel v. Wargo, supra (*quoting*, Donovan v. Agnew, 712 F.2d 1509 (1st Cir 1983)). The interpretive rule's requirement that common employers be "completely dissociated" in effect overrides their corporate status and ignores the economic realities that many small businesses cannot afford full-time workers. The interpretive rule provides lip service to an employee's right to choose to work for separate entities, but imposes de facto overtime pay liability if that choice is to work for a company "not completely disassociated" with another employer. 29 C.F.R. §791.2 n.5.

The economic impact of this overbroad interpretive standard to many businesses who otherwise cannot afford to hire full time staff is significant. For example, in the health care industry, many hospitals have established health care systems to address patients' needs post-hospitalization with home nursing, rehabilitation clinics, outpatient therapy and other services. If a nurse or other practitioner needs additional work, or, for the purposes of a patient's continuity of care, chooses to work for the hospital and another related outpatient facility, the system's affiliation would create joint employment requiring overtime pay. Similar circumstances are present with restaurant or entertainment associations for whom waiters or other employees choose to work at various independently owned operations. To the extent any two companies maintain a relationship of sorts, whether business or even personal, wherein the entities are even remotely associated, the interpretive rule forces a collapse of the entities for the purposes of hours worked by a common employee. The cost to the employers is significant. Accordingly, Petitioners submit that the FLSA interpretive

joint employment rule is overbroad as stated and ambiguous in its application requiring this Court's review and determination.

2. The Joint Employment Rule In Effect Restricts An Employer's Ability To Hire Qualified Employees and Employee Right To Choose Work.

As applied in this case, the Courts below ruled that because the employees in this case worked for both corporate petitioners, one of which was partially managed by the other, A-One Medical and Alternative Rehabilitation were joint employers of those employees under the interpretive rule criteria. 29 C.F.R. §791.2(b). Yet, the interpretive bulletin also provides that "an employer should not be held responsible for an employee's action in seeking, independently additional part-time employment" while still insisting that any such employment performed for "joint employers" who "permit or require the employee to work more than the number of hours specified in the Act must pay overtime for all such excess hours. 29 C.F.R. §791.2 (n.5) In this case, the employers were the corporate entities which allowed employees the opportunity to obtain additional work for the other company. The intent of the employers was to maintain a separate employment relationship with each employee who provided different types of nursing care services to different types of patients, at different rates of pay. The single link between the entities was the evolving managerial control of Alternative by Lorraine Black, the sole owner of A-One Medical Services, Inc.

This broad definition of joint employment not only impacts an employers ability to use qualified employees, but it also restricts those employees from obtaining work. Where the employees are highly paid professionals, the cost of the

overtime pay discourages cross employment of staff from affiliated or related entities. Indeed, it is the cost of overtime that often counsels employers against offering full time employment, which as here would increase the employees pay from an average of $16.00 an hour to $24.00. Many small businesses, particularly those who work in health care and other price-controlled markets, simply cannot afford to pay such wages. In effect, then, the joint employment rule restrains individual employees ability to obtain full-time or additional work.

Moreover, the clear intent of the FLSA was to protect abuse of low-wage workers being forced to work long hours. Rutherford, supra. Such concerns do not apply to highly paid professionals who choose to work extra hours for another employer. The totality of the employment circumstances was deemed to include not only the integration of the work for the benefit of one production, but also to include the employee's individual right to choose to work. Griffin & Brand, supra. As applied here, employers are restrained from offering additional work with affiliated companies to employees for fear of accrued overtime liability. Consequently, then, workers are effectively restricted in their ability to work. Though unintended, the impact on employees right to work counsels for this Court to review the interpretive joint employment rule.

CONCLUSION

Petitioners respectfully request the Court to accept this case for review due to the overriding conflict in the interpretation of the willful standard for violations of the FLSA and due to the overbreadth of the interpretive joint employment rule and its impact on employment relations.

Respectfully Submitted,

Elizabeth Zink Pearson
Counsel of Record
Lucian Bernard
Pearson & Bernard P.S.C.
1224 Highway Avenue
Covington, KY 41011
(859) 655-3700

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35158

[Filed October 6, 2003]

ELAINE L. CHAO, Secretary of Labor, Plaintiff-Appellee,	)
v.	)
A-ONE MEDICAL SERVICES, INC.; ALTERNATIVE REHABILITATION HOME HEALTHCARE, INC.; LORRAINE BLACK and HANAHN KORMAN, Defendants-Appellants.	)

Appeal from the United States District Court
for the Western District of Washington
No. CV-01-00371 BJR
Barbara J. Rothstein, District Judge, Presiding

Before: Richard D. Cudahy,* Diarmuid F. O'Scannlain and Ronald M. Gould, Circuit Judges

OPINION

CUDAHY, Circuit Judge:

The Secretary of Labor brought this suit on behalf of eight former employees of A-One Medical Services, Inc. (A-One) and Alternative Rehabilitation Home Healthcare, Inc. (Alternative) to recover unpaid overtime wages for work between July 1998 and January 2000. The district court granted summary judgment in favor of the Secretary, who was awarded both the overtime wages and an equal amount in liquidated damages. We affirm in part and reverse in part.

Because this case was decided on summary judgment, we are required, as was the district court, to view all facts in the light most favorable to the defendants. *Diruzza v. County of Tehama*, 323 F.3d 1147, 1152 (9th Cir. 2003). To that end, all of the facts below, unless otherwise noted, come from Lorraine Black's and Hanahn Korman's depositions, interrogatories or briefs.

As of 1996, Black and Korman independently owned and operated, respectively, A-One and Alternative, Washington state corporations engaged in the business of providing health services to patients in their homes. That year, Black entered into negotiations with Korman for A-One to purchase Alternative. Black was interested in the purchase of

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Alternative because she sought to obtain certain state-issued, county-specific Medicare Certificates of Need that Alternative possessed but A-One did not. These additional Certificates of Need, which were otherwise difficult to obtain, would allow Black to expand her business into Kitsap, Thurston and Pierce counties. Although the parties reached an agreement for the sale, the transaction encountered two complications. First, Alternative was behind in its taxes. As late as the time of oral argument, Alternative's outstanding tax liability still stood in the way of the deal's closing. The other problem was that Alternative, although it had the desired Certificates of Need, was not yet certified as a Medicare provider. In order to retain its Certificates of Need while being acquired, Alternative needed to be Medicare-certified prior to completion of its purchase by A-One. This second complication was remedied when Alternative's Medicare certification became effective on February 22, 1999.

In order for Alternative to successfully pass the state survey required for Medicare certification, however, it received a great deal of help from Black and A-One. According to Black, Alternative alone would have had difficulty passing the survey because Alternative had very few "Medicare-like" patients. Therefore, to facilitate the certification, Black agreed to transfer two "Medicare-like" patients from A-One to Alternative. In order to maintain continuity of care, A-One arranged for nurses to be transferred along with the patients they were serving. A-One also assisted Alternative with staffing and client supervision in preparation for Medicare certification.

The substantial merging of A-One's and Alternative's operations was not limited, however, to the cooperation necessary to secure Alternative's Medicare certification. Both before Alternative's Medicare certification and after, the two

companies' operations became very closely coordinated. As Black acknowledged in her deposition, A-One oversaw the patient care of Alternative, supervised Alternative's employees, contracted accounting services for Alternative, contracted vendors for Alternative, answered Alternative's telephone calls at the office A-One shared with Alternative[1] and oversaw Alternative's paperwork to comply with government requirements. The receptionist shared by A-One and Alternative was an A-One employee, the answering service shared by A-One and Alternative was paid for by A-One, the last person to process Alternative's payroll was an A-One employee, the same supervisors oversaw nurses from both companies and, perhaps most significantly, A-One and Alternative shared one scheduler for the employees of both companies. In 1998 or 1999 — the defendants are inconsistent as to the date[2] — Black and Korman entered into mediation due to problems surrounding the sale of Alternative and amended the sale agreement that they had previously reached.

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[1] According to the Appellants, Alternative did maintain a separate office until late 1999. Appellants' Opening Br. at 12.

[2] Korman, in her deposition, stated repeatedly that the mediation occurred in early 1998, and that date appears to be substantiated in Yarbrough's declaration and Black's deposition (which, taken in 2001, refers to the mediation as having taken place "about three years ago"). At another point in Korman's deposition, however, she purports to correct her testimony by indicating that the testimony should refer to 1999 instead of 1998, and Black's declaration refers to the mediation as occurring in 1999. The defendants have not attempted to claim that the apparent ambiguity as to the date of the mediation substantially affects the outcome. Given that numerous other undisputed facts support the closely coordinated operation of A-One and Alternative for the entire period relevant to this lawsuit, it is immaterial to the result whether the mediation occurred in 1998 or 1999.

Under this amendment, Korman continued to manage the care of only one Alternative patient while Black and A-One assumed responsibility for all other services rendered by Alternative. Black was initially paid a monthly management fee by Alternative, but, as Alternative became less and less profitable, it was agreed that no fee would be paid. Instead, Alternative's losses and profits were simply left in the corporation to be assumed by Black when the sale was finalized. Korman has remained the owner and president of Alternative, but her duties have been primarily limited to representing the company in situations requiring her participation as legal owner. She has had no role in the day-to-day functioning of Alternative and, as of late 2001, knew very little about the status of the company. In essence, the arrangement between Black and Korman provides that Korman will no longer have any financial interest in Alternative.

The transfer of patients and employees between the two companies also went beyond what was necessary for Alternative's Medicare certification. Not only were "Medicare-like" patients transferred from A-One to Alternative, but some patients were transferred from Alternative to A-One as well. The findings of the Department of Labor also support the picture of a relatively fluid movement of employees between the two companies, even after Alternative received its Medicare certification in February 1999. Indeed, most of the overtime wages sought accrued, according to the Department of Labor, after that date.

There was, however, always some degree of separation between A-One and Alternative. There was no formal arrangement between A-One and Alternative to share employees. All employees completed applications for

employment and signed employment agreements with both companies. All employees received separate paychecks from the two companies.[3] In many cases, the hourly wage varied between the two companies. Employees were always given the choice to decline an assignment from either company.

In April 1999, the Department of Labor launched an investigation of A-One. Karen Murphy, an investigator with the Wage and Hour Division, conducted an audit of both A-One and Alternative records and determined that eight employees were not paid overtime wages, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(a)(1). A-One, as it turns out, was not new to overtime wage violations. In 1991 and in 1994, the Wage and Hour Division had found A-One owing back wages of $9873 to 46 employees and $8055 to 45 employees, respectively. Black had signed a settlement agreement in 1994 paying $1200 in civil penalties and agreeing to comply with the FLSA in the future.

The investigation led to this suit against A-One, Alternative, Black and Korman, in which the Secretary of Labor alleged a willful violation of the overtime and recordkeeping requirements of the FLSA. The government sought unpaid overtime wages, an equal amount in liquidated damages on behalf of eight employees and a permanent injunction to stop the defendants from committing future violations of the act. In November 2001, the district court

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[3] This is one of the few facts surrounding the operation of the two companies that was directly in dispute among the parties. One former employee stated in her declaration that she generally received paychecks from only one company. For the purposes of our decision, we resolve this dispute in favor of the Appellants.

granted the government's summary judgment motion, denying only the injunction.

We review a grant of summary judgment de novo. *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1111 (9th Cir. 2001). Viewing the evidence in the light most favorable to the non-moving party, we determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). In this case, the Appellants dispute five different district court holdings. First, the Appellants argue that Alternative was simply not subject to the FLSA. Second, the Appellants argue that it was legally improper to aggregate the employees' work for A-One with their work for Alternative in determining overtime. Third, a finding of willfulness here invoked a three-year statute of limitations under 29 U.S.C. § 255(a). The Appellants argue that any violation was not willful, making appropriate a two-year statute of limitations. Fourth, the Appellants argue that they had a good faith defense, making liquidated damages inappropriate under 29 U.S.C. § 260. Finally, the Appellants argue that any claim two of the employees had is barred by res judicata, since those two employees had earlier pursued, and lost, claims in state small claims court. We review each of these decisions in turn.

A.Coverage by the FLSA

In order to be covered by the FLSA's overtime rules, employees must be "engaged in commerce or in the production of goods for commerce, or . . . employed in an enterprise engaged in commerce." 29 U.S.C. § 207(a)(1). In other words, coverage exists if either the employee is engaged in commerce (individual coverage), 29 U.S.C. § 203(b) (defining "commerce" as "trade, commerce, transportation,

transmission, or communication among the several States or between any State and any place outside thereof"), or the employer is an enterprise engaged in commerce (enterprise coverage), 29 U.S.C. § 203(s) (defining "enterprise engaged in commerce" as enterprises that, inter alia, have annual gross revenue of $500,000 or greater). *See Zorich v. Long Beach Fire Dep't & Ambulance Serv., Inc.*, 118 F.3d 682, 686 (9th Cir. 1997) (interpreting identical language in 29 U.S.C. § 206). The Appellants concede that A-One meets the criteria for enterprise coverage and so is subject to 29 U.S.C. § 207. However, Alternative, which meets the other criteria for enterprise coverage, had annual revenues under $500,000. *See* 29 U.S.C. § 203(s)(1)(A)(ii) (requiring that an "enterprise engaged in commerce" have annual revenue of at least $500,000).

Nonetheless, if A-One and Alternative constitute for purposes of the FLSA a single "enterprise," it is irrelevant whether Alternative alone satisfied the revenue requirement. Instead, the proper inquiry would be whether the single enterprise comprised of A-One and Alternative satisfied the requirement. "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." 29 U.S.C. § 203(r)(1). If these three elements — related activities, unified operation or common control and common business purpose — are present, different organizational units are grouped together for the purpose of determining FLSA coverage. *Id.*; *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 518, 93 S. Ct. 1138, 35 L. Ed. 2d 463 (1973). Despite the Appellants' argument to the contrary, there is no material factual dispute as to any of these elements, and the district court's conclusion that A-One and Alternative constituted a single enterprise for the purpose of

coverage under § 207 was correct. We consider the three elements in order.

The activities of two companies are "related" if they are "the same or similar." *Arnheim & Neely*, 410 U.S. at 518 (quoting S. Rep. No. 145, at 41 (1961)). The district court held that the fact that both A-One and Alternative provide home health services "is more than sufficient to establish that the two companies' activities are 'related.'" District Ct. Order at 6 (citing *Brennan v. Plaza Shoe Store, Inc.*, 522 F.2d 843, 848 (8th Cir. 1975), which held that a shoe store and a dress store engaged in related activities because they both sold "articles of wearing apparel . . . to the general public entering the premises which housed both stores"). The Appellants in their reply brief assert that A-One only provided "private duty home health services" while Alternative and A-One's sister corporation, A-One Home Health, provided Medicare services. Even if, however, we accept the Appellants' assertion that A-One and Alternative were servicing different types of patients, under different levels of care and eligibility requirements, the fact that they were both providing home health services is sufficient for our conclusion that the two companies were clearly engaged in "related activities." *See also Brock v. Hamad*, 867 F.2d 804, 806 (4th Cir. 1989) (holding that management of single family homes and management of an apartment building were related activities under the FLSA).

"'Common' control . . . exists where the performance of the described activities [is] controlled by one person or by a number of persons, corporations, or other organizational units acting together." 29 C.F.R. § 779.221. "'[C]ontrol' . . . includes the power to direct, restrict, regulate, govern, or administer the performance of the activities." *Id.* The district court held that A-One and Alternative were under common

control because both were controlled by Black. The Appellants argue that "although Ms. Black did oversee the clinical operations of Alternative, the owner of Alternative, Hanahn Korman, had the ultimate authority over financial operations of the company." Appellants' Br. at 13-14. The Appellants' argument relies on a definition of "control" based on formal corporate structure rather than practical operation. "We must look beyond formalistic corporate separation to the actual or pragmatic operation and control, whether unified or, instead, separate as to each unit." *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 970 (5th Cir. 1984). Despite Korman's formal corporate authority, there is no doubt here, from the deposition testimony of Black and Korman, that Black had effectively undisputed control over Alternative's operations. Indeed, by the time of Black's deposition, she had assumed all financial responsibility for, and claimed the benefits and burdens of, the profits and losses of Alternative. A-One and Alternative were clearly under common control.[4]

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[4] The Appellants argue that the business arrangement between A-One and Alternative falls within the ambit of arrangements that 29 U.S.C. § 203(r)(1) specifically lists as not indicating common control:

> [A] retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser

"Common business purpose" is perhaps the most opaque part of the three-part test. The district court held that "[i]t is clear that Black managed the two companies for a common business purpose: to service home health patients, who were clients of either company, utilizing the same pool of nurses, the same scheduler, and the same phone service." We agree with the Eighth Circuit that a common business purpose is generally found where there are related activities and common control. *See Plaza Shoe Store*, 522 F.2d at 848 (citing with approval a Wage-Hour Administrator's opinion that courts have considered the satisfaction of the first two elements to suggest the satisfaction of the third, and collecting cases). With undisputed evidence that the activities of A-One and Alternative were related and that A-One and Alternative were under common control, there is no reason to doubt that A-One and Alternative shared a common business purpose.

Because A-One and Alternative performed related activities under common control for a common business purpose, the district court properly identified A-One and Alternative as a single enterprise for purposes of the FLSA's jurisdictional requirement. Since A-One by itself meets the revenue requirement for FLSA enterprise coverage, the single enterprise comprised of A-One and Alternative also satisfies the requirement. Accordingly, both A-One and Alternative are subject to § 207.

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within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

The facts here clearly do not fall within the exceptions outlined in § 203(r)(1).

B. Joint Employers

An employer becomes responsible for overtime once its employees exceed forty hours in one workweek. 29 U.S.C. § 207(a)(2)(C). If an individual is working for more than one company at a time, it is necessary to determine whether the individual's employers should be treated separately or jointly for purposes of determining the employers' responsibilities under the FLSA.

> If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the [FLSA]. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.

29 C.F.R. § 791.2(a) (footnotes omitted). *See, e.g.*, *Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205, 1208 (7th Cir. 1986) (aggregating hours from joint employers for the purpose of determining overtime); *Wirtz v. Hebert*, 368 F.2d

139, 141-42 (5th Cir. 1966) (same); *cf. Moon v. Kwon*, 248 F. Supp. 2d 201, 236-38 (S.D.N.Y. 2002) (applying § 791.2(a) to find joint and several liability for overtime wages from joint employers). "[T]he concept of joint employment should be defined expansively under the FLSA." *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997).

Whether two companies constitute a single enterprise for FLSA coverage and whether they are liable as joint employers under § 207 are technically separate issues. *See, e.g., Patel v. Wargo*, 803 F.2d 632, 637 (11th Cir. 1986) ("[T]he enterprise analysis is different from the analysis of who is liable under the FLSA. The finding of an enterprise is relevant only to the issue of coverage."). Nonetheless, the district court held that, "for the same factual considerations that led the court to conclude that A-One and Alternative Rehabilitation constituted one enterprise, . . . the two companies were 'joint employers.'" While we believe that the district court's analysis was correct, this issue, being the core substantive question, merits more discussion.

The Appellants cite and discuss the eight-factor "economic reality" test for determining joint employment status in certain contexts, *see, e.g., Torres-Lopez*, 111 F.3d at 640, while at the same time recognizing that that test may be inapplicable. We agree with the Appellants that that test is inapplicable here because it applies only to circumstances in which a company has contracted for workers who are directly employed by an intermediary company. Indeed, our case law contains more examples of such "vertical" joint employment than examples of "horizontal" joint employment of the type in question here. *See, e.g., Torres-Lopez; Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748 (9th Cir. 1979). Thus, in place of our eight-factor test, the relevant regulations primarily guide our determination of joint employment status here.

"A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case." 29 C.F.R. § 791.2(a).

> Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; *or*
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; *or*
>
> (3) *Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.*

29 C.F.R. § 791.2(b) (footnotes omitted and emphases added). Subsection 791.2(b)(3) tells us that joint employment will generally be considered to exist when 1) the employers are not "completely disassociated" with respect to the employment of the individuals and 2) where one employer is controlled by another or the employers are under common control.

Black oversaw the work being done for Alternative's clients. Black, through A-One, managed Alternative's employees and the same nursing supervisors and the same scheduler were in charge of the employees while working for either company. A-One and Alternative were not completely disassociated with respect to the employment of the individuals at issue. As both the district court and we have noted, the evidence clearly indicates that A-One and Alternative were operated under the common control of Black. There is no dispute as to any of these facts, and these facts fully support the legal conclusion that A-One and Alternative were joint employers that must aggregate, for purposes of FLSA compliance, the work done by their employees for both companies.

C. Willfulness

A violation of the FLSA is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 100 L. Ed. 2d 115, 108 S. Ct. 1677 (1988); *SEIU, Local 102 v. County of San Diego*, 60 F.3d 1346, 1356 (9th Cir. 1994) (quoting *Richland Shoe*). Because the district court found the Appellants' violations of the FLSA willful, the Appellants were held liable for overtime violations in the preceding three years rather than just the preceding two years. 29 U.S.C. § 255(a) (providing a three-year statute of limitations for willful violations of the FLSA).

The district court here supported its finding of knowledge or reckless disregard with testimony from former employees of the Appellants. According to former employee Becky Lockard, when she complained of being denied overtime pay, Black told her that she "was technically working for two

different companies," and that she would have "to work over 40 hours a week at each company to receive pay at the overtime rate." Kathleen Yarbrough, another nurse working for the two companies, was told that she should "think of all the blessings [she was] getting" and that Black "would go broke if she had to pay the nurses who worked on the state-pay cases for their overtime."[5] Donna Iverson, former scheduler for both companies, reported that she spoke to Black several times about the potential overtime issue, and was told that "because [A-One and Alternative were] two separate companies[,] the nurses would not receive overtime pay until they worked over forty hours for each company." According to Iverson, Black told her that if the overtime wages "ever became a problem[, Black] would file for bankruptcy."

We are wary of giving full credence to this evidence, not least of all because some of these former employees are the very employees whose interests are at stake in this litigation. Nonetheless, we agree with the district court that the Appellants did not sufficiently controvert this evidence to create a genuine issue of fact. Had the Appellants in their filings before the district court effectively presented evidence that cast doubt on whether these statements were made, it would have been proper for the district court, in viewing all the evidence in the light most favorable to the Appellants, to have disregarded the former employees' statements. Here, however, the Appellants never denied that Black made the alleged statements. Instead, the Appellants in their pleadings in opposition to summary judgment merely relied on the argument that the "unsubstantiated" "statements of the

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[5] Apparently, the margin on state-paid cases was smaller than the margin on privately paid cases.

disgruntled employees . . . fail to support the Secretary's right to a judgment as a matter of law."[6] We disagree and find that the uncontroverted statements, even viewed in the light most favorable to the Appellants, support a finding of willfulness.

Despite the fact that the Appellants did not directly contest the former employees' testimony, we need not rely solely on that testimony in affirming the district court's finding of willfulness. Unlike the district court, we find probative A-One's former FLSA violations, even if they were different in kind from the instant one and not found to be willful. The fact that A-One previously had run-ins with the Labor Department certainly put A-One and Black on notice of other potential FLSA requirements. While mere knowledge that the FLSA "was in the picture" may not be enough to sustain a finding of willfulness, *Richland Shoe*, 486 U.S. at 132-35, A-One's prior FLSA violations, especially when combined with the undisputed testimony of the former employees, prove, at the very least, reckless disregard on the part of Black and A-One for the illegality of treating A-One and Alternative separately for the purpose of determining overtime pay. *See Alvarez v. IBP, Inc.*, Nos. 02-35042, 02-35110, 339 F.3d 894, 2003 U.S. App. LEXIS 15622, at *36 (9th Cir. Aug. 5, 2003) (noting that willfulness exists "where an employer disregarded the very possibility that it was violating the [FLSA]" (internal quotation marks omitted)). Neither Black's efforts at maintaining a superficial separation between the two companies nor the formally separate legal existence of the two entities creates any material doubt as to Black's reckless

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[6] The Appellants have since expressly conceded that Black did make the statement reported by Yarbrough.

disregard.[7] The district court applied the correct statute of limitations.

D. Liquidated Damages

An employer who violates the overtime law is liable not only for the unpaid overtime compensation but also "in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). "These liquidated damages represent compensation, and not a penalty. Double damages are the norm, single damages the exception." *Local 246 Util. Workers Union v. S. Cal. Edison Co.*, 83 F.3d 292, 297 (9th Cir. 1996) (citations and internal quotation marks omitted). Courts have the discretion to deny an award of liquidated damages if the

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[7] One of the Appellants' arguments is that Black's efforts at maintaining separation between the two companies (e.g., separate paychecks, employment forms, etc.) tend to prove that her FLSA violations were not willful, i.e., that her efforts were aimed at FLSA compliance. Were the crucial question of joint employment a closer one, we might accord more credit to such efforts. For example, two employers may share employees but make serious efforts to "completely disassociate" themselves with respect to the employment of the shared individuals. Under such different circumstances, the efforts at separateness might, at the very least, make willfulness a question more appropriate for a jury than for disposition on summary judgment. In this case, however, we do not believe that there is any genuine issue of fact about Black's willfulness. Black's efforts at keeping A-One and Alternative separate, even viewed in the light most favorable to her, appear to have been steps made to evade the FLSA, not to comply with it. *See Alvarez*, 339 F.3d 894, 2003 U.S. App. LEXIS 15622, at *37 ("IBP was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them. To the contrary, IBP's actions may more properly be characterized as attempts to evade compliance . . . .").

employer shows that it acted in subjective "good faith" and had objectively "reasonable grounds" for believing that its conduct did not violate the FLSA. 29 U.S.C. § 260. Although we generally review a district court's decision on liquidated damages for abuse of discretion, *Local 246 Util. Workers Union*, 83 F.3d at 298, we review the issue here, which was decided below on summary judgment, de novo.

The Appellants argue that the district court erred in awarding liquidated damages because genuine issues of material fact existed concerning the Appellants' good faith defense. Of course, a finding of good faith is plainly inconsistent with a finding of willfulness. *See Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1130 (9th Cir. 2002) (noting the contrapositive, that a finding of good faith precludes a finding of willfulness). Even if we were to ignore our finding of willfulness, there are not sufficient facts to support a finding of good faith on the part of the Appellants. If, for example, the Appellants had secured some objective authority, or at the very least sought advice, on the legality of treating A-One and Alternative as separate employers for the purpose of calculating overtime, we would have a different case. *See, e.g.*, *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 841 (6th Cir. 2002) ("Nor has [the defendant] suggested that it was relying on the expertise or opinion of any other person or entity with knowledge of the FLSA regulations, including its attorney or the Department of Labor."); *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 641 (5th Cir. 2001) (approving a finding of good faith where the employer consulted with the Department of Labor) Black's reckless belief that formal separation of the two entities would justify nonpayment of overtime wages is legally insufficient as a good faith defense.

E. Res Judicata

In 2000, several employees of A-One and Alternative left their employment with those corporations and accepted positions with competitors. A-One believed that its former employees were soliciting its patients, and so brought a lawsuit in Snohomish County Small Claims Court to enforce non-compete agreements that it had with the former employees. Two of the former employees then filed unsuccessful counter-claims against A-One. Ila Millard sued for breach of her employment agreement, harassment and unpaid overtime. Kathleen Yarbrough made a claim for unpaid vacation pay and Medicare taxes, but also explained to the small claims court judge that she was due overtime wages. *See* Black Decl. at 5-6, Record at 49 Ex. A ("The Court dismissed both counterclaims for overtime pay which were based on a collapse of A-One and Alternative after proof of the separate corporate status of A-One and Alternative was presented."); Yarbrough Dep. at 23-24 ("And as far as the overtime pay . . . I talked . . . about how we worked for both companies . . . and that I should deserve overtime pay . . . ."), Record at 49 Ex. I; Millard Dep. at 14 (confirming that she made a claim for unpaid overtime), Record at 49 Ex. K; Record at 49 Exs. B, C, D, & E (court documents). The Appellants argue that these state court judgments preclude the Secretary from recovering overtime wages on behalf of these two employees.

"Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980). A federal court must give to a state court judgment the same preclusive effect as would the courts of the state in which it was rendered. *Migra v. Warren City Sch.*

Dist. Bd. of Educ., 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). "Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165, 168 (Wash. 1983). *Cf. Sidhu v. Flecto Co., Inc.*, 279 F.3d 896, 900 (9th Cir. 2002) ("To trigger the doctrine of res judicata, the earlier suit must have (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies.").

The district court gave three reasons why res judicata did not bar the Secretary's claims against the Appellants: (1) "the record does not show that there was 'an identity of claims,' as it is unclear what the legal and factual basis was for the counterclaim"; (2) "[i]t is similarly unclear whether there was a 'final judgment on the merits'"; and (3) "[t]he defendants have proffered no authority suggesting that a counterclaim arising out of a private contract suit bars the Secretary from seeking, pursuant to the FLSA, recovery for under-compensated employees," i.e., no privity. Because res judicata is a defense, we view all facts in the light most favorable to the plaintiff.

The first substantial question is whether the small claims causes of action and the Secretary's cause of action have a concurrence of identity. While identity of causes of action cannot be determined precisely by mechanistic application of a simple test, we consider four factors: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the

same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Rains*, 674 P.2d at 168 (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)).

It is clear enough from the evidence presented that the employees' state court claims and the Secretary's suit arose out of the same transactional nucleus of facts, the employees' work with A-One and Alternative. It is not clear exactly what evidence was presented in the state counterclaims, but we do not believe that this uncertainty, which could well have been the result of dubious conduct of the litigation by the employees, is significant in light of the certainty that the suits arose from the same transactional nucleus of facts and that both employees made at least some arguments with respect to overtime. These two factors suggest a concurrence of identity of claims.

The remaining two factors apply to Yarbrough and Millard differently. Perhaps the most difficult factor here is whether the state court suits involved infringement of the same right as the instant suit. With regard to Millard, although we know she pursued an overtime claim, we do not know definitively under what statute or theory she was proceeding. This uncertainty, however, does not obscure the fact that Millard admittedly pursued a claim for unpaid overtime wages. Even if Millard did not raise the FLSA argument being raised here, she could and should have. *See Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 996 P.2d 603, 609 (Wash. 2000) ("Unlike issue preclusion [collateral estoppel], which applies only to issues actually litigated, claim preclusion applies to what might, or should, have been litigated as well as to what was actually litigated."); *see also Allen*, 449 U.S. at 94. Also, the Appellants, rightly or wrongly, won in the small claims court the "right" not to pay

the overtime wages to Millard. In light of all these factors, we find that Millard's state counterclaims involved the same claims as the instant suit brought by the Secretary.

Yarbrough's situation is different. Even if Yarbrough discussed unpaid overtime wages in the state court proceeding, all of the evidence other than Black's declaration shows that Yarbrough did not actually pursue a claim for overtime wages. Her counterclaim only involved vacation pay and Medicare taxes. Even if the vacation pay and overtime wage claims arose from the same transactional nucleus of facts, her joint employment by A-One and Alternative, we do not believe there to be a sufficient concurrence of identity of the causes of action to preclude the Secretary's suit with respect to Yarbrough. We therefore approve the district court's decision not to apply res judicata to the Yarbrough claims.

We next need to determine whether, with respect to Millard, the defendants have met the other prerequisites for res judicata. The district court had found uncertainty as to whether there was a final judgment in the earlier proceeding and whether the Secretary is in privity with Millard in bringing an FLSA suit. We do not believe that there is material doubt about whether there were final judgments on the earlier claims. While there is a lack of detail which makes it impossible to determine exactly how the small claims court decided the claims before it, it is clear enough that Millard's claims were rejected in Snohomish County. That element is satisfied.

Perhaps the most difficult issue here is identity of parties, or privity. We have previously held that a suit by the Secretary of Labor does not preclude a suit brought by the employees on whose behalf the secretary sued. *See Bechtel*

Petroleum Inc., v. Webster, 636 F. Supp. 486 (N.D Cal. 1984), *aff'd and adopted*, 796 F.2d 252, 253 (9th Cir. 1986). In *Bechtel*, first the employees filed a state action. While the state case was on appeal, the Secretary instituted a federal action, which ended with the Secretary and the employer's entering into a consent decree favorable to the Secretary and the employees. After the consent decree, the employees continued to press their state law claims. *Bechtel* on this set of facts found that the state action was not precluded because § 261 (c) did not expressly terminate actions filed by employees prior to the Secretary's filing. *Bechtel*, 636 F. Supp. at 499 ("[The FLSA does] not expressly allow the Secretary to terminate *prior filed* federal actions, or state actions." (emphasis added)). The Washington Supreme Court has held that a consent decree between the EEOC and an employer does not bar an employee from pursuing a subsequent claim against the employer. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 887 P.2d 898 (Wash. 1995).

We find several key distinctions between *Bechtel* and *Loveridge* and the present case. Unlike in *Bechtel* and *Loveridge*, the employees here have already pursued their claims — their suits came before the Secretary's. If *Bechtel* and *Loveridge* were at all grounded on the concern that the Secretary would coopt claims that most directly belonged to the employees, that concern is not present here. Nor are we dealing with here as we did in *Bechtel* a question of whether a prior filed action is barred. The unusual order of filings, appeals and consent decrees found in that case is not present here.

We acknowledge that *Bechtel* contains language on the differing motives of employees and the Secretary of Labor for bringing FLSA suits. *Bechtel*, 636 F. Supp. at 500; *see also Loveridge*, 887 P.2d at 901-02 (recognizing the differing

motives of employees and the EEOC). And, perhaps under some circumstances, such differences, combined with the interest that employees have in preserving their rights, may dictate that an employee has a claim against an employer even though the Secretary has already pursued a claim. In the instant case, however, there appears to be no divergence of interests between the Secretary and Millard. *See id. at 902* (recognizing that the EEOC and employees may sometimes be in privity). The Secretary is suing for employee-specific rights of precisely the sort Millard already pursued; the "requisite closeness of interests" for privity is present. In *Loveridge*, the employee expressly disagreed with and excluded herself from the agreement reached between the employer and the EEOC. *Id.* In *Bechtel*, the employees sought relief under state law that the Secretary could not obtain under federal law. Here, we have no such discrepancies or distinctions. Indeed, if Millard had succeeded in her counterclaim and been awarded overtime wages, the EEOC would not sue for those wages already paid to her. The fact that Millard lost her claim should not change the result. In this context, the EEOC seeks only to recoup Millard's individual economic loss, not to vindicate broader governmental interests by, for example, seeking an injunction. Thus, there is privity, and we are satisfied that the defendants have met all the requirements for a determination of res judicata.

Nor does the nature of the earlier proceedings, small claims counterclaims, somehow bar preclusion. Washington courts look to four factors in determining whether a prior proceeding should have preclusive effect: the character of the court, the scope of the court's jurisdiction, procedural informality and procedural safeguards. *See State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 57 P.3d 300, 304-06 (Wash. Ct. App. 2002) (rejecting preclusion because Washington small claims proceeding involving less than $250

in controversy cannot be appealed). *State Farm*, which is controlling here, held that the only reason there was no preclusive effect in that case was because there was no right to appeal. According to *State Farm*, Washington small claims court cases in which there is a right to appeal meet all four factors. *But cf. Sanderson v. Niemann*, 17 Cal. 2d 563, 110 P.2d 1025, 1030-31 (Cal. 1941) (refusing collateral estoppel, or issue preclusion, effect to California small claims judgments, in part due to the informality of the proceedings). Millard's small claims counterclaim was for more than $2000, and so she had the right to appeal. Thus, the nature of the proceedings gives no cause to deny res judicata effect. We therefore reverse the contrary decision of the district court, and the Secretary's claims as to Millard (but not as to Yarbrough) are barred.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C01-0371R

[Filed November 28, 2001]

ELAINE L. CHAO, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, Plaintiff,	)
v.	)
A-ONE MEDICAL SERVICES, INC., a corporation, ALTERNATIVE REHABILITATION HOME HEALTHCARE, INC., a corporation, LORRAINE BLACK, an individual and HANAHN KORMAN, an individual, Defendants.	)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on the parties' cross-motions for summary judgment. Plaintiff Elaine Chao, Secretary of the Department of Labor ("Secretary"), initiated this action, alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. against the defendants A-One Medical Services ("A-One") and Alternative Rehabilitation Home Health Care ("Alternative Rehabilitation") and their Individual owners. The Secretary alleges that the defendants jointly employed eight former employees, who, based on an aggregation of the hours worked for both employers, are entitled to back overtime pay and an equal amount in liquidated damages. The Secretary also seeks an injunction against future violations of the FLSA and a determination that the defendants' alleged violations were willful. Defendants oppose Secretary's summary judgment motion and move for summary judgment on the grounds of, inter alia, lack of FLSA jurisdiction and lack of a joint employment relationship.

Having reviewed the documents filed in support and in opposition to these motions, along with the relevant portions of the record, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

The following facts are not disputed. Defendants A-One and Alternative Rehabilitation are separately owned Washington corporations engaged in the business of providing home health serves to patients in their homes. Both corporations currently operate at the same address in Everett, Washington.

In 1996, Defendant Lorraine Black, sole shareholder and president of A-One, entered into negotiations with Defendant

Hanahn Korman, president and sole shareholder of Alternative Rehabilitation, for the purchase of Alternative Rehabilitation. The sale remains pending while Alternative Rehabilitation resolves outstanding tax liabilities. In the meantime, Alternative Rehabilitation obtained certification for Medicare services with the assistance of Lorraine Black. Korman, thereafter, relinquished day-to-day oversight of the corporation, contracting with A-One to oversee operations in late 1999.

During 2000, several employees terminated their employment with the defendants and accepted positions with a competitor. A-One, believing that its patients were being solicited by these former employees, brought a lawsuit to enforce non-compete agreements to which its employees had agreed. Two of the former employees, Ila Millard and Kathleen Yarbrough, counterclaimed, alleging that A-One and Alternative Rehabilitation were joint employers and that they were accordingly due overtime pay under the ELSA. Their counterclaims were unsuccessful.

In April 1999 the Secretary initiated an investigation of A-One. In May 2000, Wage Hour Investigator Karen Murphy conducted an audit of both A-One and Alternative Rehabilitation and calculated underpaid overtime wages based on the alleged joint employment status.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Genuine issues of material fact that preclude summary judgment are "disputes over facts that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The "plain language of Rule 56(c) mandates entry, of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985).

B. Liability Under the FLSA

The federal employment protection afforded workers under the FLSA is expansive. The Supreme Court has stated that "within the tests of coverage fashioned by Congress, the Act has been construed liberally to apply to the furthest reaches consistent with congressional direction." Mitchell v. Lubin, McGaughy & Assocs., 358 U.S. 207, 211 (1959). One of the protections afforded by the FLSA is overtime wages. The FLSA requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of forty hours a week. 29 U.S.C. § 207(a)(1). The Secretary alleges that the defendants jointly employed at least eight employees who are owed overtime wages for work which they performed.

The issues presently before the court are: (1) whether defendant Alternative Rehabilitation is subject to the FLSA; (2) whether A-One and Alternative Rehabilitation "jointly" employed the allegedly undercompensated employees; (3) whether the defendants' alleged acts or omissions were

"willful"; (4) whether two of the allegedly undercompensated employees are barred from recovering under the doctrine of res judicata; and; (5) whether a prospective injunction against future violations is appropriate.

1. FLSA Jurisdiction over Alternative Rehabilitation

The FLSA applies to all the workers of "an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a). An enterprise engaged in commerce on the production of goods for commerce is, inter alia, an enterprise "whose annual gross volume of sales made or business done is not less than $ 500,000 . . . ." 29 U.S.C. § 203(s)(1)(A)(ii).

Defendants contend that the Secretary must show that both A-One and Alternative Rehabilitation independently meet the coverage limits of the ELSA. While defendants do not contest that A-One meets the $500,000 threshold, defendants contend that ELSA jurisdiction is improper over Alternative Rehabilitation, as it does not meet the threshold. The Secretary, on the other hand, argues that ELSA jurisdiction is established over both A-One and Alternative Rehabilitation because they are a single enterprise within the meaning of the ELSA.

The court is persuaded that the two companies are a single "enterprise," and, accordingly, Alternative Rehabilitation's low dollar volume is no obstacle to ELSA jurisdiction.

a. Enterprise Coverage

For two corporations to constitute one "enterprise," three criteria must be met under 29 U.S.C. § 203(r)(1): (1) the corporations perform "related activities, (2) through unified

operation or common control, (3) for a common business purpose. See also Brennan v. Arnheim & Neely, Inc., 410 U.S. 512, 518, 93 S. Ct. 1138, 35 L. Ed. 2d 463 (1973).

All three criteria are met here:

i. Related Activities

Activities are deemed "related" for the purposes of the ELSA when activities are "the same or similar." Id. Here, A-One and Alternative Rehabilitation perform identical activities; both provide home health services. This fact is more than sufficient to establish that the two companies' activities are "related." Cf. Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843 (8th Cir. 1973) (holding that dress shop and shoe store that were located on the same premises, shared office facilities and billing accounts were engaged in related activities, as each sold articles of apparel to the general public).

ii. Common Control

In responding to the issue of whether the two companies are "commonly controlled," the defendants stress that each company maintained separate home health licenses, serviced different areas, used separate tax identification numbers, filed separate income tax returns, maintained separate personnel records, and shared no identity of shareholders, officers or directors. They further argue that there was no agreement between the companies to share employees. Each employee, they contend, had the option to work for the other company.

The Secretary contends that A-One and Alternative Rehabilitation were a single enterprise because, inter alia, Lorraine Black "managed, controlled and administered the

day-to-day activities of Alternative Rehabilitation." Pl.'s Resp. at 12. The record supports the Secretary's argument. Black admits that she managed the operations of Alternative Rehabilitation and has acted on its behalf with respect to clients, patients, and the state government agencies. See, e.g., Murphy Decl. Ex. 13 (letter written by Black, on Alternative Rehabilitation stationary, as "Administrator" of Alternative Rehabilitation to an employee, describing the care a certain patient needed and writing that "[the patient] is . . . our most fragile client."). On February 2, 1999, A-One made a request to have its name changed to Alternative Rehabilitation. Id. Ex. 14. On March 1, 1999, Black registered as the agent for Alternative Rehabilitation. Id. Ex. 2. Black testified that she provides supervision to Alternative Rehabilitation employees, reviews the company's payroll, contracts for the company, answers its telephone, oversees paperwork for government compliance and pays for a shared answering service between A-One and Alternative Rehabilitation. Black Dep. 55-59, 66.

The record also demonstrates that A-One and Alternative Rehabilitation shared employees, such as nurses and a scheduler. Lockard Decl. at 2 (registered nurse stated that she had "the same pay and the same supervisor whether I was working for A-One or for Alternative Rehab[ilitation]."). One employee also indicated that, while "she saw patients for both companies, [she] only received one pay check, which was from A-One." Id. Later, this employee says she received "one check from A-One and one check from Alternative Rehabilitation[, but] Lorraine Black signed both checks." Id. Another former employee testified that she would receive her checks from A-One and Alternative Rehabilitation in the same envelope, even though the checks were generated by two different accountants on two different bank accounts. Yarbrough Decl. at 4. The scheduler whom the two companies shared would schedule employees to work for both

companies for patients who had been transferred from one company to another. Iverson Decl. at 7.

That the defendants were jointly operated and controlled is also apparent in seemingly minor details such as the fact that both companies received phone calls on the same line, that there was only a outdoor sign for A-One on the office location, and that the two companies shared the same office space.

iii. Common Business Purpose

It is clear that Black managed the two companies for a common business purpose: to service home health patients, who were clients of either company, utilizing the same pool of nurses, the same scheduler, and the same phone service. Courts have held on similar facts that companies have shared a "common business purpose." See, e.g., Reich v. Bay, Inc., 23 F.3d 110 (5th Cir. 1994) (holding that where two companies shared business functions such as advertising, payroll, bookkeeping, and employees the two companies shared a "common business purpose."). The "common business purpose" is further evidenced by Black's testimony that she managed Alternative Rehabilitation so as to strengthen the company, ultimately planning to and merge it with A-One. Black Dep. at 79-83. Such a shared profit motive is sufficient to establish a "common business purpose." See, e.g., Wurtz v. Savannah Bank & Trust Co., 362 F.2d 857, 861 (5th Cir. 1966).

In short, the undisputed facts are that A-One and Alternative Rehabilitation shared a manager, profit motive, nurses, administrative services, and a sing location. Cf. Dole v. Odd Fellows Home Endowment Bd., 912 F.2d 689 (4th Cir. 1990) (holding that entities which provide mutually

supportive services to the advantage of each entity are operationally interdependent and may be treated as a single enterprise under the ELSA) Accordingly, the court finds that the defendants were one "enterprise" within the meaning of the FLSA and together meet the "enterprise coverage" threshold.

2. Joint Employment

The determination of whether an entity is a "joint employer" under the FLSA is a question of law. Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983).

Regulations promulgated under the FLSA recognize that an employee may have more than one employer under the FLSA. 29 C.F.R. § 791.2(a) ("A single individual may stand in the relation of an employee to two or more employers at the same time . . . ."). If an employee does work that simultaneously benefits two or: more employers, and the employers are not "completely disassociated," the employee's hours must be aggregated for overtime purposes. The Department of Labor's ("DOL") regulations provide:

> [I]f the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.

29 C.F.R. § 791.2(a). Id. In such situations, all joint employers are "responsible, both individually and jointly, for compliance with all of the applicable provisions of the

[FLSA], including the overtime provisions . . ." 29 C.F.R. § 791.2(a). The court concludes, for the same factual considerations that led the court to conclude that A-One and Alternative Rehabilitation constituted one enterprise, supra, that the two companies were "joint employers."

3. Defendants' Willfulness

Under the FLSA, there is a two-year statute of limitations governing any cause of action, unless the plaintiff can prove that the alleged violation was willful. See 29 U.S.C. § 255(a). A violation is willful when an employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited" by the FLSA. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988); see also Marshall v. Union Pac. Motor Freight Co., 650 F.2d 1085, 1092 (9th Cir. 1981) ("A violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions.").

The Secretary argues that the defendants' violations were willful. The Secretary points out that A-One has twice been found to have been in violation of the FLSA. Those previous two violations -- the last of which occurred in 1994 -- were not belated to overtime compensation. The court finds that, to the extent that those violations were different in kind and appear not to have been willfully committed, they are not probative on whether the instant violations were willful. But see Hodgson v. Cactus Craft of Arizona, 481 F.2d 464 (9th Cir. 1973) (where two warnings did not prevent a third violation, the previous violations of employer's labor practices employer's violations were willful so that three-year, rather than two-year, statute of limitations applied).

There is undisputed evidence in the record, however, that demonstrates that the defendants "knew or should have known" that its conduct was prohibited by the FLSA. There is undisputed testimony of former employees to the effect that Black, as manager for both A-One and Alternative Rehabilitation, meticulously attempted to maintain the separateness of the two companies, in part, to avoid paying the employees overtime. See, e.g., Lockard Decl. at 3 (stating how she was instructed to use different time cards for each company and that she was "encouraged to work overtime using clients from each company"); Yarbrough Decl. at 3 (stating that her complaints about working overtime were ignored) Iverson Decl. at 7 (explaining how, as scheduler, she scheduled the same nurses to each company's clients, that the differences in the two companies were superficial, and that she complained to Black that nurses were working overtime). Defendants have not rebutted any of this testimony.

The court finds that defendants have, at least, shown reckless disregard for the requirements of the statute such that the three-year statute of limitations, bather than the normal two-year statute of limitations, applies.

a. Liquidated Damages

If an employer has violated the FLSA, the employees are entitled to liquidated damages unless the employer meets its burden of proving both that the employer acted in subjective good faith and that it had reasonable grounds for believing it was not violating the FLSA. 29 U.S.C. § 260; 29 C.F.R. § 790.22(b). Liquidated damages are imposed not to punish the employer, but rather as "compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated

damages." Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 707, 65 S. Ct. 895, 89 L. Ed. 1296 (1945).

In actions brought under the FLSA, there exists "a strong presumption in favor of doubling" the damages award, and because the employer has burden of proving good faith and because that burden is substantial, "double damages are the norm, single damages the exception." Walton v. United Consumers Club, Inc., 786 F.2d 303, 310 (7th Cir. 1986). "The employer has the plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982).

The defendants argue that their good faith is evidenced by their "scrupulous" attempts to keep the two companies separate, prior to the as-yet-unconsummated merger. For the reasons discussed above, the court finds that defendants have not shown that their FLSA violations were made in good faith or that they had reasonable grounds for believing that they were complying with the FLSA. The uncontroverted evidence shows that the defendants' attempt to maintain the two corporation's separateness was motivated, at least in part, by a desire to avoid paying overtime wages. Accordingly, liquidated damages are appropriate here.

4. Res Judicata

Defendants argue that two of the allegedly undercompensated employees, Kathleen Yarbrough and Ila Millard, have litigated the issue of the overtime wages allegedly owed them and lost. Accordingly, the defendants

argue, the doctrine of res judicata prevents them from re-litigating that issue in this forum.

The doctrine of res judicata bars "relitigation in a subsequent action of any claims that were raised or could have been raised in the prior action." Davis Wright & Jones v. Nat'l Union Fire, 709 F. Supp. 196, 199 (W.D. Wash. 1989). The elements of res judicata are "(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties." Id.

In 2000, former employees Yarbrough and Millard, along with others, terminated their employment with A-One and accepted positions with a competitor. A-One brought an action in small claims court to enforce the former employees' noncompetition agreements. Yarbrough and Millard initiated a counterclaim against A-One for overtime wages.[1] The court awarded A-One damages based on the noncompetition agreements and dismissed the counterclaims for overtime wages.

As the Secretary points out, defendants have not demonstrated that res judicata bars recovery by Yarbrough and Millard. The Secretary, not those former employees, initiated this action, pursuant to its statutory mandate to enforce the FLSA. See 29 U.S.C. § 216(c). The defendants have proffered no authority suggesting that a counterclaim arising out of a private contract suit bars the Secretary from seeking, pursuant to the FLSA, recovery for undercompensated employees. Moreover, the record does not show that there was "an identity of claims," as it is unclear

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[1] The parties seem to dispute whether Yarbrough initiated a counterclaim against the defendants.

what the legal and factual basis was for the counterclaim. It is similarly unclear whether there was a "final judgment on the merits." There is nothing in the record suggesting that the former employees presented the small claims court with any evidence, which was then considered and rejected by that court on the merits. In sum, defendants' res judicata argument fails.

5. Prospective Injunction for Future Compliance

The Secretary asks this court to enjoin defendants from further violations of the FLSA. In deciding whether to grant injunctive relief, the court "must weigh the finding of violations against factors that indicate a reasonable likelihood that the violations will not recur." Brock v. Big Bear Market No. 3, 825 F.2d 1381, 1383 (9th Cir. 1987).

The court finds that the Secretary has not demonstrated that future violations are likely to occur. Assuming 'the defendants are currently in compliance, and that the pending merger will prevent the defendants' from avoiding the FLSA's overtime provision in the future, the court sees no basis for enjoining the defendants from committing future violations.

III. CONCLUSION

For the foregoing reasons, the court GRANTS in part and DENIES in part plaintiff's motion for summary judgment [docket no. 22-1] and DENIES defendants' motion for summary judgment (docket no. 47-1]. The court directs defendants to pay $ 7,294.85 in backwages and an equal amount in liquidated damages.

DATED at Seattle, Washington this 28th day of November, 2001.

/s/_____
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C01-0371R

[Filed December 4, 2001]

ELAINE L. CHAO, Secretary of Labor, U.S. Department of Labor, Plaintiff,	)
v.	)
A-ONE MEDICAL SERVICES, INC., a corporation, et al., Defendants.	)

This matter having come before the court and the court being fully advised, the court GRANTS in part and DENIES in part plaintiff's motion for summary judgment, DENIES defendants' motion for summary judgment, and orders defendants to pay **$7294.85** in backwages and an equal amount in liquidated damages.

Dated this 4TH day of December 2001 at Seattle, Washington.

BRUCE RIFKIN
Clerk of Court
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Supreme Court, U.S.
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No. 03-1114

In the Supreme Court of the United States

A-ONE MEDICAL SERVICES, INC., ET AL.,
PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor
Washington, D.C. 20210

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QUESTIONS PRESENTED

1. Whether petitioners acted in reckless disregard of their obligations under the Fair Labor Standards Act of 1938 (FLSA) and thus willfully violated the FLSA when, for purposes of paying overtime, they failed to aggregate the hours worked by employees for their two integrated corporations.

2. Whether petitioners' corporations were "joint employers" for purposes of paying overtime under the FLSA when they had common management and shared office space, clients, and employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 346 F.3d 908. The decision and order of the district court (Pet. App. 27a-41a, 42a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. On December 30, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 3, 2004. The petition for a writ of certiorari was filed on January 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners A-One Medical Services, Inc. (A-One), and Alternative Rehabilitation Home Healthcare, Inc. (Alternative), are separately owned corporations that provide health services to patients in their homes. Pet. App. 2a. In 1996, A-One's sole shareholder and president, petitioner Lorraine Black, entered into negotiations with Alternative's sole shareholder and president, petitioner Hanahn Korman, to purchase Alternative. *Id.* at 28a-29a. Black sought to acquire Alternative because it possessed Medicare Certificates of Need that would permit A-One to expand its business into other counties. *Id.* at 3a. Black and Korman reached an agreement for sale. *Ibid.* The agreement, however, has not been consummated. *Id.* at 29a.

After Black and Korman reached the agreement for sale, the two companies' operations became "very closely coordinated." Pet. App. 4a. Black transferred patients from A-One to Alternative, along with A-One's nurse employees who had cared for the patients. *Id.* at 3a. In addition, Alternative transferred patients to A-One. *Id.* at 5a.

Black eventually became responsible for the management of all services rendered by A-One and Alternative. Pet. App. 5a. Alternative initially paid Black a fee for this role, but the parties later agreed that no fee would be paid. *Ibid.* A-One, through Black or A-One's employees, oversaw Alternative's patient care, supervised its employees, and contracted for its vendors, including its accounting services. *Id.* at 4a. A-One also shared office space with Alternative, and an A-One receptionist answered the telephone calls for both companies. *Id.* at 4a, 34a.

The companies maintained some degree of separation. For example, employees were required to sign separate employment agreements with each corporation. Pet. App. 5a-6a. Employees received separate paychecks from each company (although checks from both companies arrived in the same envelope and were all signed by Black), and, in many instances, employees were paid at different rates by the two companies. *Id.* at 6a, 33a. Employees were also permitted to decline an assignment from either company. *Id.* at 6a. The same supervisors, however, oversaw nurses from both companies, and the same scheduler scheduled their duties. *Id.* at 4a.

A-One and Alternative paid overtime on a company-segregated basis, *i.e.*, only when an employee's hours with a particular company exceeded 40 per week. During some workweeks between July 1998 and January 2000, eight employees worked more than 40 combined hours for the companies but were not paid an overtime premium for the excess hours. Pet. App. 6a; C.A. E.R. 77.

During that time period, employees complained to Black about the companies' failure to make overtime payments. See Pet. App. 15a-16a, 37a. One of the employees who complained was a nurse who had been paid overtime by A-One before she and her patient were transferred to Alternative, but who did not receive overtime for the same number of hours after the transfer because her hours with that patient were treated as separate Alternative hours. C.A. Supp. E.R. 23. Black responded to the complaints by telling employees that they were "technically working for two companies" and that she would "go broke if she had to pay the nurses who worked on the state-pay cases for their overtime." Pet. App. 15a-16a.

Before the events in this case, the Department of Labor's Wage and Hour Division had twice conducted investigations of A-One's compliance with the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 201 *et seq.* In 1991, the Division had found that A-One owed back wages to 46 employees for overtime violations, and in 1994 the Division had found that A-One owed back wages to 45 employees for overtime violations. Pet. App. 6a. In 1994, the Division assessed civil money penalties against A-One for repeated and willful violations, and Black signed a settlement document in which she agreed individually and on behalf of A-One to comply with the FLSA. *Ibid.*; C.A. Supp. E.R. 11-12.

2. Respondent Secretary of Labor filed suit alleging that petitioners violated the FLSA because A-One and Alternative were joint employers and failed to pay overtime to employees when their combined hours with A-One and Alternative exceeded 40 per week. See 29 U.S.C. 207(a)(1).

The district court granted summary judgment to the Secretary. The court first concluded that A-One and Alternative engaged in related activities under common control for a common business purpose and therefore were a single "enterprise" for FLSA coverage purposes. Pet. App. 32a-35a; see 29 U.S.C. 203(r)(1). The court held that A-One and Alternative were engaged in related activities because they both provided home health services. Pet. App. 32a. The court concluded that the two companies were under common control because Black managed Alternative and acted on its behalf with respect to clients, patients, and state government agencies. *Id.* at 32a-34a. It further held that A-One and Alternative had a common business purpose "to service home health patients, who were clients of

either company, utilizing the same pool of nurses, the same scheduler, and the same phone service." *Id.* at 34a. That common business purpose was also evidenced, the court reasoned, by Black's testimony that she managed Alternative so as to strengthen the company for its ultimate merger with A-One. *Ibid.*[1]

The district court concluded that the same facts showed that A-One and Alternative were joint employers under the Secretary's regulation governing joint employment, 29 C.F.R. 791.2(a). Thus, petitioners violated the FLSA to the extent that they failed to pay overtime compensation when an employee's combined hours with the companies in a workweek exceeded the FLSA threshold. See Pet. App. 35a-36a.

The district court also concluded (Pet. App. 37a) that the petitioners "at least, show[ed] reckless disregard" for the FLSA's requirements and thus their violations were "willful" under *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), so that they are subject to the Act's three-year, rather than two-year, statute of limitations. 29 U.S.C. 255(a). The court cited the unrebutted testimony of former employees showing "that Black, as manager for both A-One and Alternative Rehabilitation, meticulously attempted to maintain the separate-

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[1] Although A-One independently meets the $500,000 gross business volume threshold for an "enterprise" under 29 U.S.C. 203(s)(1)(A)(ii), Alternative does not. Thus, Alternative is covered by the FLSA only if, as the district court held, it is a single "enterprise" with A-One. Petitioners have not sought this Court's review of that ruling, but the district court's analysis of that issue is intertwined with the "joint employer" ruling, which petitioners do challenge in this Court.

ness of the two companies, in part, to avoid paying the employees overtime." Pet. App. 37a.[2]

The district court therefore concluded that petitioners violated the FLSA over a three year period and awarded $7294.85 in back wages and an equal amount in liquidated damages. Pet. App. 42a.

3. The court of appeals affirmed in relevant part. Pet. App. 1a-26a. On the joint employer issue, the court agreed with petitioners that an "eight factor 'economic reality' test for determining joint employment" applies only to "vertical" joint employment contexts, *i.e.*, where a company has contracted for workers who are directly employed by an intermediary company. *Id.* at 13a. The court concluded that, in cases of "horizontal joint employment, of the type in question here," the Secretary's interpretive regulations at 29 C.F.R. 791.2 "primarily guide [the] determination of joint employment status." Pet. App. 13a. The court observed that, under those regulations, joint employment generally exists where the employers are not completely disassociated with respect to the employment of the individuals at issue and one employer is controlled by the other or the employers are under common control. See *id.* at 14a (citing 29 C.F.R. 791.2(b)(3)).

Applying those criteria, the court concluded that the companies were not completely disassociated with respect to the employees' employment because Black oversaw the work done by Alternative's employees, and the same nursing supervisors and scheduler were

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[2] The district court concluded that evidence that A-One had committed prior overtime violations of a different kind was not probative of the willfulness of petitioners' current violations, and thus rested its ruling exclusively on the employee affidavits and complaints. Pet. App. 36a.

in charge of employees working for both companies. Pet. App. 15a. The court concluded as well that the undisputed facts showed that both companies were under the common control of Black. *Ibid.* Accordingly, A-One and Alternative were joint employers that must aggregate the work performed by employees for both companies. *Ibid.*

The court of appeals also affirmed the district court's ruling that petitioners' violations reflected a reckless disregard of the Act and thus were willful under the *Richland Shoe* standard. Pet. App. 15a-18a. The court of appeals stated that, although it was "wary of giving full credence" to statements of employees whose interests were at stake, petitioners did not sufficiently controvert the employees' affidavits describing their complaints about the lack of overtime pay and Black's responses. *Id.* at 16a-17a. The court concluded that this uncontroverted evidence, even when viewed in the light most favorable to petitioners, supported the finding of willfulness. *Id.* at 17a.

In addition, the court of appeals, unlike the district court (see note 2, *supra*), found it "probative" that A-One had previously committed FLSA overtime violations. Pet. App. 17a. The court concluded that, even though the prior overtime violations were different in kind from the present violations, A-One's "run-ins with the Labor Department certainly put A-One and Black on notice of other potential FLSA requirements." *Ibid.* The court recognized that mere knowledge that the FLSA is "in the picture" does not establish willfulness, but concluded that A-One's overtime violations, "especially when combined with the undisputed testimony of the former employees" about Black's response to their complaints, show, "at the very least, reckless disregard * * * for the illegality of treating A-One and

Alternative separately for the purpose of determining overtime pay." *Ibid.*

The court also rejected petitioners' argument that Black's "efforts at maintaining separation between the two companies * * * tend to prove that her FLSA violations were not willful." Pet. App. 18a n.7. The court concluded that the argument might be worthy of credence if "the crucial question of joint employment [were] a closer one," but, in the circumstances of this case, Black's "efforts at keeping A-One and Alternative separate, even viewed in the light most favorable to her, appear to have been steps made to evade the FLSA, not to comply with it." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and neither its holding on willfulness nor its holding on joint employment conflicts with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners contend (Pet. 6-11) that the court of appeals' willfulness determination conflicts with this Court's decision in *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), and with decisions of other courts of appeals applying the *Richland Shoe* standard. That contention lacks merit.

Richland Shoe held that an employer commits a "willful" violation of the FLSA if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the" Act. 486 U.S. at 133. Contrary to petitioner's claim (Pet. 6-9) that the court of appeals applied a negligence standard rather than the *Richland Shoe* standard, the court of appeals expressly quoted *Richland Shoe*'s "knew or showed reckless disregard" standard. See Pet. App. 15a. The

court of appeals then proceeded to apply that standard and concluded that petitioners' conduct manifested a reckless disregard for the Act. See *id.* at 17a ("A-One's prior FLSA violations, especially when combined with the undisputed testimony of the former employees, prove, at the very least, *reckless disregard* * * * for the illegality" of petitioners' conduct) (emphasis added); *id.* at 17a-18a ("[n]either Black's efforts at maintaining a superficial separation between the two companies nor the formally separate legal existence of the two entities creates any material doubt as to Black's *reckless disregard*") (emphasis added).

Petitioners ignore the court of appeals' express quotation and application of the *Richland Shoe* standard. Instead they focus (Pet. 7) on the court's quotation (in a parenthetical to a citation) of a statement in a prior Ninth Circuit opinion that "willfulness exists 'where an employer disregarded the very possibility that it was violating the FLSA.'" Pet. App. 17a (quoting *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 908-909 (9th Cir. 2003), petition for cert. pending, No. 03-1238). The court of appeals did not rely on that statement as establishing the standard for when a violation is willful, but merely quoted the statement in explaining that A-One had previously violated the FLSA and demonstrated a cavalier attitude when employees complained about the violations in this case. In any event, the quoted language is consistent with a "reckless disregard" standard because "disregard[ing] the very possibility" of a violation may well be reckless. *Ibid.* In fact, the *Alvarez* decision, from which the language is quoted, itself applied the "reckless disregard" standard. See 339 F.3d at 909 ("We agree with the district court and conclude that 'the proof demonstrate[s] [that the employer] *recklessly disregarded* the possibility that

[it] was violating the FLSA.'") (emphases changed). Thus, the Ninth Circuit, like the courts of appeals identified by petitioner (Pet. 8), applies the "reckless disregard" standard of *Richland Shoe*. The court of appeals did not deviate from that standard in this case, and there is thus no conflict between the decision below and decisions of the courts of appeals identified by petitioners (Pet. 7-8) as rejecting a negligence standard.

Petitioners incorrectly assert that the court of appeals imposed an "*absolute* affirmative duty on employers to 'inquire further' into the legality of their conduct." Pet. 8 (emphasis added). The court's conclusion that petitioners acted in reckless disregard of their FLSA responsibilities was premised on a variety of factors, including petitioners' previous violations, their response to complaints by employees, and the weakness of petitioners' argument that they lacked joint employer status. See Pet. App. 16a-18a & n.7. The court nowhere endorsed a general rule that employers commit a willful violation of the FLSA whenever they fail to seek advice about the legality of their actions. Thus, petitioners are off the mark in asserting that the decision below conflicts with court of appeals decisions holding, on the particular record before them, that a willfulness finding was not required by an employer's failure to obtain advice or take further action. See Pet. 8 (citing, *e.g.*, *Reich* v. *Department of Conservation & Natural Res.*, 28 F.3d 1076, 1084 (11th Cir. 1994) (finding employer's failure to do "more to ameliorate the problem" was result of negligence but not reckless disregard)).

Petitioners also err in contending (Pet. 9-11) that the court of appeals adopted a "[r]epeat [o]ffender '[s]trict' [l]iability" rule under which FLSA violations are willful whenever the employer has previously violated the

Act. Pet. 9. Contrary to that contention, the court merely concluded that A-One's "previous run-ins with the Labor Department" gave it notice of other potential FLSA requirements and therefore was one factor weighing in favor of willfulness. Pet. App. 17a. The court relied on a variety of circumstances other than the prior violations in determining that petitioners acted willfully, including the undisputed testimony that former employees had complained to petitioners that they were violating the FLSA, and Black's efforts to maintain the appearance of separation between the two companies despite the fact that they were clearly joint employers. *Id.* at 15a-17a, 18a n.7. Indeed, notwithstanding the prior violations, the court of appeals noted that, "[w]ere the crucial question of joint employment a closer one," whether petitioners acted willfully might "at the very least" have presented a jury question. *Id.* at 18a n.7.[3]

Even petitioners themselves acknowledge (Pet. 10) that prior violations and a promise of future compliance may, in some circumstances, have weight in deter-

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[3] Because the court of appeals did not adopt a rule that an employer's history of prior FLSA violations necessarily establishes willfulness, its decision is in harmony with decisions concluding that the existence of prior violations does not *require* a finding of willfulness. See, *e.g.*, *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060, 1080 (1st Cir. 1995) (although the Secretary presented a "tenable argument[]" that Department's prior investigation, in which it explained overtime provisions of FLSA to employer, established willfulness, district court's contrary ruling was not clearly erroneous); *Reich* v. *Gateway Press, Inc.*, 13 F.3d 685, 702 n.20 (3d Cir. 1994) (district court was within its discretion in excluding consent judgment from consideration of willfulness question where that judgment involved different corporate defendants and did not shed light on coverage of the class of employees at issue).

mining whether a particular violation is willful. To the extent that petitioners contend that findings of previous FLSA violations weigh in favor of willfulness only if they involve precisely the same type of violation, that proposition is untenable. Even when prior violations involve different provisions, they serve "to acquaint [the employer] with the general requirements and policy of the" Act, and they are thus a factor in the totality of the circumstances bearing on whether the employer acted with reckless disregard. *Reich* v. *Waldbaum, Inc.*, 52 F.3d 35, 41 (2d Cir. 1995).

The court of appeals' determination, based on the totality of the circumstances, that petitioners willfully violated the FLSA is correct. The testimony of petitioner Black, the nurse employees, and the nurse scheduler showed substantial merging of A-One and Alternative's operations. Nonetheless, Black continued to maintain separate employment records depending on whether patients were nominally being served by A-One or Alternative. In the face of employee complaints that overtime should be paid when their combined service for patients exceeded 40 hours per week, Black gave cavalier responses and failed to seek advice about the legality of her conduct. In addition, the Department of Labor had on two previous occasions determined that Black had committed violations of the FLSA (including overtime violations), resulting in her payment of thousands of dollars in back wages and civil money penalties. Those circumstances, as a whole, provide a sufficient basis for the court's determination that petitioners acted in reckless disregard of the FLSA's requirements. See Pet. App. 16a-18a & n.7. That fact-bound determination does not warrant review by this Court.

2. Petitioners do not argue that the court of appeals' holding that they were joint employers conflicts with any decision of this Court or of another court of appeals. See Pet. 12 ("legal application of the interpretive joint employment rule is an issue of first impression with this Court"). Rather, they contend that the ruling below "establishes an overbroad and ambiguous standard for businesses who cannot provide full-time work and therein allow employees to work elsewhere." Pet. 11. Contrary to that contention, the court of appeals properly applied the Secretary's interpretive regulations on joint employment and correctly concluded that petitioners' highly integrated operation met the standards for joint employment.

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. 203(e)(3). An entity "[e]mploy[s]" an individual under the Act if it "suffer[s] or permit[s]" that individual to work, 29 U.S.C. 203(g), and the term "'[e]mployer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d). Those broad definitions look to whether as a matter of "economic reality" an entity functions as an individual's employer. *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33 (1961). In accord with this Court's precedent, the Department of Labor's interpretive regulations recognize that a worker may be employed by more than one entity at the same time. *Falk* v. *Brennan*, 414 U.S. 190, 195 (1973); 29 C.F.R. 791.1-791.2. Where the facts establish that an employee is employed jointly by two or more employers, all of the employee's hours worked during the workweek are considered as one employment for purposes of the Act. 29 C.F.R. 791.2.

The court of appeals' holding that A-One and Alternative were joint employers rests on 29 C.F.R. 791.2(a)(3). That regulation provides that a joint-employer relationship exists where employers are not "completely disassociated *with respect to the employment of a particular employee*" and are "deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." 29 C.F.R. 791.2(a)(3) (emphasis added). The court of appeals concluded that the regulatory criteria were satisfied in this case because of "the substantial merging of A-One's and Alternative's operations," Pet. App. 3a, which was evidenced by Black's general control over Alternative's operations and by the substantial common control exercised by her and other managers over employees, whether those employees served A-One's patients, Alternative's patients, or both. *Id.* at 15a.

Petitioners are thus incorrect when they assert that the court's ruling imposes joint employer status on "[a]ll [e]mployers [w]ho [c]ommonly [e]mploy [a] [w]orker" (Pet. 11), applies "where there is only the barest association or a simple potential of a common business purpose" (Pet. 14), and covers "any two companies" that "are even remotely associated" (Pet. 17). To the contrary, as the plain language of the regulation makes clear, there must be an association between the businesses "with respect to the employment of a particular employee," and one business must control the other or the businesses must be under common control. 29 C.F.R. 791.2(b)(3). The court of appeals found those requirements met here because of the integrated operation of A-One and Alternative, including the common management of the relevant

employees. See Pet. App. 15a. Petitioners' contention that the court's ruling is overbroad and ambiguous is thus based on a mischaracterization of the ruling and lacks merit.

Petitioners also err in asserting (Pet. 15-16) that the employees' ability to decline assignments is inconsistent with the conclusion that petitioners are joint employers. Although a compulsory transfer of employees between employers would support the conclusion that their operations are integrated, the absence of compulsory transfers does not preclude a joint employer finding. In fact, the absence of mandatory cross-employer assignments has virtually no significance here, because employees could decline *any* assignment, even an intra-company one, *i.e.*, employees assigned to an A-One patient could decline assignment to another A-One patient. Thus, the absence of a mandatory cross-assignment policy does not undermine the conclusion that there was substantial merging of A-One's and Alternative's operations, including management of the relevant employees.[4]

Petitioners acknowledge (Pet. 14) that the joint-employer concept applies to an "integrated 'unit of production,'" like the meat packing company in *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947), which contracted out a portion of its slaughterhouse operation

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[4] Petitioners appear to argue (Pet. 15-16) that employees' ability to decline work should be considered as part of a multi-factor test for assessing joint employment that would include factors other than those identified in 29 C.F.R. 791.2. In the court of appeals, however, petitioners argued that a multi-factor test was inapplicable. Pet. App. 13a. In any event, petitioners concede (Pet. 15, 16) that employees' ability to decline work is not an independent factor currently considered by the courts or the Department of Labor in assessing whether joint employment exists.

to "individual contractor" boners. Petitioners attempt to distinguish (Pet. 14-15) an integrated unit of production from the situation here because, in that context, "the producer or employer at the top of the chain" benefits from the fruits of the employees' labor and thus "suffer[s] or permit[s]" the employees to work within the meaning of 29 U.S.C. 203(g). That purported distinction does not withstand scrutiny. Like the integrated unit of production in *Rutherford*, the integration of A-One and Alternative's operations was designed to benefit those corporations and their owners (by facilitating the anticipated sale of Alternative to A-One), and the employees' labor clearly contributed to the owners' joint goals. See Pet. App. 34a (explaining that A-One and Alternative have a common business purpose); see also *id.* at 5a (noting that "Alternative's losses and profits were simply left in the corporation to be assumed by Black when the sale was finalized"). Moreover, because of the common management of the employees, both A-One and Alternative are properly deemed, as in the integrated production unit context, jointly to "suffer or permit" the employees to work.

Petitioners also incorrectly contend (Pet. 16) that the joint-employer principle should not apply to "highly paid professionals," as petitioners refer to the employees in this case. Petitioners do not argue that the employees fall within the Act's exemption for professional employees, 29 U.S.C. 213(a)(1), and the FLSA and its interpretive principles therefore fully apply to them. Petitioners' related assertion (Pet. 18-19) that the high cost of overtime discourages employers from employing highly paid workers and thereby impairs the ability of those employees to obtain additional work is, in essence, a quarrel with the policy underlying the

FLSA, and is properly addressed to Congress rather than this Court.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

HOWARD M. RADZELY
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
MARK S. FLYNN
Attorney
Department of Labor

APRIL 2004

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[5] Petitioners cite (Pet. 10, 13) Department of Labor press releases and a newspaper article as support for the proposition that the Department's regulations are outdated and unclear. The cited article and press releases do not address the Department's joint employer regulations, but instead concern the regulations implementing the FLSA exemption for executive, administrative, professional, outside sales, and computer employees. See 29 U.S.C. 213(a); 29 C.F.R. Pt. 541; 68 Fed. Reg. 15,560 (2003) (proposal to amend Part 541 regulations). The article and press releases are thus irrelevant to the questions presented here.